

Before the
FEDERAL COMMUNICATIONS COMMISSION
 Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
 Implementation of the Telecommunications)
 Act of 1996:)
)
 Telecommunications Carriers' Use of)
 Customer Proprietary Network Information)
 and Other Customer Information)

CC Docket No. 96-115

To: The Commission

REPLY COMMENTS

Paging Network, Inc. ("PageNet"), by its attorneys, respectfully submits the following reply on the issues raised in the Federal Communications Commission's ("Commission") *Further Notice of Proposed Rulemaking* in the above-captioned docket.¹ For the reasons explained below, the Commission should allow carriers in a wireless wholesale-resale arrangement to address by contract any measures needed to protect the confidentiality of the resale carrier's customer proprietary network information ("carrier CPNI"). In addition, PageNet agrees with the unanimous position of carrier commenters that Section 222 does not give consumers the right to restrict a carrier's use of CPNI for all marketing purposes.

¹ *Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information, Second Report and Order and Further Notice of Proposed Rulemaking*, CC Docket No. 96-115, 63 FR 20326 (April 24, 1998) ("*Further Notice*"). By Public Notice dated May 7, 1998, the Commission extended the comment period for issues raised in the *Further Notice*. DA 98-864 (rel. May 7, 1998).

I. WIRELESS CARRIERS SHOULD ADDRESS PROTECTION OF CARRIER CPNI BY CONTRACT

In the *Further Notice*, the Commission asked for comment on additional safeguards that may be necessary to protect the confidentiality of information that a carrier provides to another carrier in the course of purchasing wholesale network services.² As the Commission noted, Section 222(a) imposes a duty on all carriers to protect the confidentiality of proprietary information, including proprietary data of and relating to resale carriers.³ Moreover, Section 222(b) states that a carrier that obtains proprietary information from another carrier may not use such information “for its own marketing efforts.”⁴ The Commission sought comment on whether any additional rules were needed to implement these sections.

The comments received by the Commission focused almost exclusively on rules needed to protect carrier CPNI when it is in the possession of incumbent local exchange carriers (“ILECs”). Major ILECs, such as BellSouth, Bell Atlantic, U S West and GTE, asserted that no rules were needed, because the statute was “self-enforcing.”⁵ Other carriers, however, asserted that due to the potential for misuse by ILECs, additional rules of varying severity should be adopted.⁶ The central issue in the debate between these carriers is the degree of an ILEC’s market power and the potential that it will misuse confidential information.

² *Further Notice*, at ¶ 206.

³ 47 U.S.C. § 222(a).

⁴ 47 U.S.C. § 222(b).

⁵ *See, e.g.*, BellSouth Comments at 6, Bell Atlantic Comments at 3; GTE Comments at 6; U S West Comments at 4-6.

⁶ *See, e.g.*, TRA Comments at 10 (suggesting strict liability for ILEC misuse); MCI Comments at 7 (arguing for the FCC to clearly define permissible uses); Intermedia Comments at 10 (FCC should vigorously enforce violations with significant fines).

PageNet acknowledges the importance of this debate. As AT&T noted in its Reply comments, the "greatest risk of abuse" exists in the case of the ILECs.⁷ Due to their historical monopoly position, every other telecommunications carrier, in one way or another, must purchase network services from an ILEC in order to provide service to their customers. Moreover, as the ILECs begin to face competition in their core local exchange market, and as they seek to expand into new telecommunications markets, their incentive and ability to misuse information they receive from other carriers is great. Thus, the Commission must consider these incentives carefully and determine what level of additional protection is needed to guard against anticompetitive use of carrier CPNI by ILECs.

Missing from the debate, however, is a meaningful discussion of non-ILEC resale situations. For example, although not required to offer resale by the Commission's rules, PageNet is one of the largest wholesale providers of messaging service in the nation, serving over 9000 resale customers. Commenters do not address how, if at all, their proposals should apply in competitive situations such as these.

PageNet submits that, regardless of how the Commission resolves the issues relating to ILEC use of carrier CPNI, no additional safeguards are needed in the case of wireless carriers. PageNet enters into a contract with each of its resale customers. These contracts are the product of arms-length negotiations between sophisticated parties. Under these circumstances, the parties are capable of addressing any additional protections necessary to safeguard carrier CPNI in the negotiation process. No FCC-imposed rules are necessary in the wireless context.

Instead, competition among wireless carriers will ensure that wholesale providers do not misuse carrier CPNI. As the Commission recently concluded in its *Third Annual CMRS*

⁷ AT&T Reply Comments at 7.

Competition Report, competition in the wireless industry is greater than it has ever been before.⁸ In particular, the Commission found the paging/messaging industry to be “highly competitive.”⁹ Thus, unlike local telephony, wholesale providers such as PageNet are incapable of exerting market power against resellers of its services. If PageNet were to insist upon an unreasonable condition, the reseller simply could go to another provider to receive service. Thus, the Commission should allow the contract process among wireless carriers to address any concerns over carrier CPNI.

II. THE COMMISSION SHOULD NOT FURTHER COMPLICATE THE ALREADY COMPLEX CPNI RULES BY ALLOWING CUSTOMERS TO RESTRICT CPNI TO A GREATER EXTENT

The *Further Notice* sought comment on whether customers should be given a right to restrict the use of CPNI within those areas the statute explicitly permits carriers to use CPNI without authorization.¹⁰ PageNet agrees with the unanimous position of carrier commenters that such a restriction should not be adopted.

The Commission’s CPNI rules already are complex and, in many instances burdensome for competitive carriers, as evidenced by the 27 petitions for reconsideration pending before the Commission. The Commission should not further burden carriers by intruding upon the safe

⁸ *Third Annual CMRS Competition Report*, at 2, FCC 98-91 (June 11, 1998) (“*Competition Report*”).

⁹ *Id.* At 51.

¹⁰ *Further Notice*, at ¶ 204-05.

harbor granted by Section 222(c)(1). Section 222(c)(1) permits carriers to use CPNI without authorization in certain limited, but service-enhancing situations. These situations reflect a balance between consumer expectations of privacy and carriers' legitimate abilities to use information derived from their provision of service. PageNet agrees with nearly every commenter in this docket that the Commission should not upset this balance by granting consumers a right to prohibit the use of CPNI even in these situations.

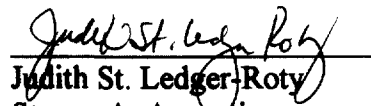
Indeed, if the Commission were to grant such a right, it would be an administrative and marketing nightmare for carriers such as PageNet. Under the present rules, PageNet has a few clear instances where CPNI may be accessed without having to compare such use to a customer's specific situation or to a database of customer approvals received. If the Commission were to adopt the proposed rule, PageNet would have to compare every single use of CPNI against such a database, or would have to segregate those customers who have chosen to deny PageNet the ability to use CPNI. Not only would such a rule be difficult to apply, but it may result in a degradation of service to a carriers' customers. Due solely to the difficulty in applying the CPNI rules, carriers may refrain from all uses of CPNI, which would make it harder to tailor services to a customer's needs. Or, carriers may place customers who prohibit the use of CPNI in a separate database, making it harder to serve these customers and potentially degrading their level of customer service vis a vis other customers of the carrier. Neither option would be pro-consumer.

WHEREFORE, for all of the foregoing reasons, PageNet respectfully requests that the Commission allow wireless carriers to address by contract additional measures to protect carrier CPNI from misuse, and refrain from adopting rules that would allow customers to prohibit carriers from using CPNI for all marketing purposes.

Respectfully submitted,

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